Supreme Court, U.S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

No. 80-94

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

against

SAM IRIZARRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004
(212) 344-7042

CICHANOWICZ & CALLAN
WILLIAM P. BYRNE
Of Counsel

Questions Presented

1. What standard of care may properly be derived from the existing conflict of the Circuit Courts of Appeals to measure the duty owed by a shipowner to a longshoreman under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

2. May a shipowner properly be held liable to a longshoreman injured on the pier by a slippery condition caused by the climate, existing on a cargo container that was discharged from the vessel and landed on the pier, while under the active control of the stevedore-employer who determined the methods of operation, supervised the details of the work, and was obliged by Federal Safety Regulations to correct any unsafe slippery condition in the area over which it assumed control?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
STATUTE AND REGULATION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	5
POINT I—The conflicting decisions of the Courts of Appeals for the First, Second, Third, Fourth, Fifth and Ninth circuits must be resolved by this Court	5
A) The First Circuit	6
B) The Second Circuit	7
C) The Third Circuit	9
D) The Fourth Circuit	12
E) The Fifth Circuit	13
F) The Ninth Circuit	14
POINT II—Congress intended that negligence under the LHWCA be uniformly defined as a matter of federal law	17
POINT III—Section 343A of the Restatement (Second) of Torts does not properly apply to this case	18
A) Section 343A is inapplicable to the purpose of LHWCA as amended in 1972	18
B) Section 343A cannot properly apply to an injury which did not occur on the vessel	21
CONCLUSION	22
APPENDIX A—Opinion of the District Court	1a
APPENDIX B—Opinion and Judgment of the Court of Appeals	4a

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases:

Anderson v. *Iceland S.S. Co.*, 585 F. 2d 1142 (1st Cir. 1978) 6, 8

Anuszewski v. *Dynamic Mariners Corp., Panama*, 540 F. 2d 757 (4th Cir.). *cert. denied* 429 U.S. 1098, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977) 12

Bachtel v. *Mammouth Bulk Carriers*, 605 F. 2d 438 (9th Cir. 1979) petition for certiorari filed October 1, 1979 ..... 5, 16

Bess v. *Agromer Line*, 518 F. 2d 738 (4th Cir. 1975) 12

Briley v. *Charente S.S. Co. Ltd.*, 572 F. 2d 498 (5th Cir. 1978) 13, 14

Brown v. *Mitsubishi Shintaku Gingo*, 550 F. 2d 331 (5th Cir. 1977) 13

Cannizzo v. *Farrell Lines Inc.*, 579 F. 2d 682 (2d Cir 1978) 20

Chavis v. Finnlines, Ltd. O/Y, 576 F. 2d 1072 (4th Cir. 1978) 5, 13

Cox v. *Flota Merchante Grancolombiana, S.A.*, 577 F. 2d 798 (2d Cir.) *cert. denied* 439 U.S. 881 (1978) ... 8, 20

Gay v. *Ocean Transport & Trading Ltd.*, 546 F. 2d 1233 (5th Cir. 1977) 13

Giglio v. *Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1980) 5, 7, 20

Harris v. *Reederei*, 596 F. 2d 92 (4th Cir.) *cert. denied* U.S. 100 S. Ct. 77 (1980) 13

Hess v. *Upper Mississippi Towing Corp.*, 559 F. 2d 1030 (5th Cir. 1977) 13, 14

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (1959), *aff'd sub. nom., Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International,* 274 F. 2d 875 (9th Cir.), *cert. denied* 363 U.S. 803 (1960) 14, 15, 16

Hurst v. *Triad Shipping Co.,* 554 F. 2d 1237 (3rd Cir. 1977) 5, 9, 10, 11

Johnson v. *A/S Ivarana Rederi,* 613 F. 2d 334 (1st Cir. 1980) 7

Lopez v. *A/S D/S Svendborg Line,* 581 F. 2d 319 (2d Cir. 1978) 8, 20

Lubrano v. *Royal Netherlands Steamship Co.,* 572 F. 2d 364 (2d Cir. 1978) 20

Lubrano v. *Royal Netherlands Steamship Co.,* No. 79-7228, Slip op. 2163 (2d Cir. March 31, 1980)..... 20

Mattivi v. *South African Marine Corp.,* 618 F. 2d 163 (2d Cir. 1980) 5, 8, 20

Morange v. *States Marine Lines,* 398 U.S. 375 (1970).. 17

Munoz v. *Flota Merchante Grancolombiana,* 553 F. 2d 837 (2nd Cir. 1977) 20

Napoli v. *Hellenic Lines, Ltd.,* 536 F. 2d 505 (2d Cir. 1976) 7, 13, 20

Rich v. *United States Lines, Inc.,* 596 F. 2d 541 (3rd Cir. 1979) 5, 10, 11, 20

Riddle v. *Exxon Transportation Co.,* 563 F. 2d 1103 (4th Cir. 1977) 5, 12

Roberts v. *Andrew Martin Sea Services, Inc.* No. 78-2219, Slip Op. 5932 (5th Cir. May 30, 1980) 14

Ruffino v. *Scindia Steam Navigation Co.,* 559 F. 2d 861 (2d Cir. 1977) 8

Samuels v. *Empressa Lineas Maritimas Argentinas*, 573 F. 2d 884 (5th Cir.), *cert. denied* 443 U.S. 915, 99 S. Ct. 3106, L. Ed. 2d (1978) 13

Santos v. *Scindia Steam Navigation Co., Ltd.*, 598 F. 2d 480 (9th Cir.) *cert. granted*, ____ U.S. ____, 100 S. Ct. 77, ____ L. Ed. 2d ____ (1980) 5, 7, 16

Statutes and Rules:

Title 28 U.S.C. 1332 3

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972:
33 U.S.C. 901 *et seq.* 2, 7
33 U.S.C. §905(b) 2, 7

29 C.F.R. Part 1918, Safety and Health Regulations for Longshoring, §1918.91(c) 2, 22

Other Authorities:

H.R. Rep. No. 1441, 92nd Cong. 2d Sess. (1972) *reprinted* in 3 U.S. Code Cong. and Admin. News pp. 4702-04 (1972) 9, 17, 18, 19

H.R. Rep. No. 92-1447, 92nd Cong. 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Admin. News 4698.. 17, 19

S. Rep. 92-1125, 92nd Cong. 2d Sess. 12..... 17

Restatement of Torts (Second) (1965):
Topic 2, Introductory Note at 394 (1965)..... 9
§342 13
§343 ..... 6, 7, 13
§343A 6, 7, 8, 9, 13, 18, 19, 20, 21, 22
§409 ..... 9, 19, 20
§§410-429 9
§414 ..... 9, 10
Comment C to §414 10
§414A 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

No._____

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

against

SAM IRIZARRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 22, 1980.

Citations to Opinions Below

The opinion of the District Court, printed in Appendix A hereto, *infra*, pp. 1a-3a is not yet reported. The informal opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pp. 4a-6a, is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 22, 1980. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Statute and Regulation Involved

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

29 C.F.R. Part 1918, Safety and Health Regulations for Longshoring, §1918.91(c):

> Slippery conditions shall be eliminated as they occur.

Statement of the Case

Plaintiff-Respondent brought this personal injury action under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) as amended in 1972 (33 U.S.C. 901 *et seq.*), claiming that the negligence of the defendant-petitioner shipowner caused the accident which resulted in his injuries.

The action was commenced in the United States District Court for the Southern District of New York on or about January 31, 1979 and jurisdiction was based on Title 28 U.S.C. 1332. A jury trial resulted in a verdict for the plaintiff. The Second Circuit Court of Appeals affirmed the District Court and this petition followed.

Statement of Facts

The plaintiff, a longshoreman, sustained injuries on February 1, 1977, when he allegedly slipped and fell from the top of a cargo container after it had been removed from the defendant's vessel by a floating derrick and had been landed on the dock which was under the exclusive control of plaintiff's stevedore employer.

The plaintiff was a regular employee of Sealand Terminals, an independent stevedore contractor, which had contracted with petitioner to discharge containers from petitioner's vessel, the *M/V Diana,* at Pier 36 East River, New York. From 8:00 a.m. until the plaintiff's accident at 7:45 p.m., the plaintiff and other employees discharged containers which had accumulation of ice and/or snow of varying degrees on them. Some snow had fallen earlier in the day and it was cold. It was not unusual to have accumulations of ice and snow for this time of the year and the condition was open and obvious. There was no evidence that the petitioner's conduct in any way caused or contributed to the accumulation of the ice and snow or that the allegedly dangerous condition could not be avoided by the exercise of ordinary care.

The discharge operation on petitioner's vessel and on the dock was conducted under the active and exclusive control of the stevedore employer and under the direct supervision of a hatch boss and a foreman both of whom were employed by an expert and experienced stevedore contractor. Although the accepted procedure for complaints about working conditions by the longshoremen was for the longshoremen to lodge their complaint either with their hatch boss or the foreman and they in turn would

relay the complaint to the shipowner, no complaints were made by any of the longshoremen to either of the supervisors or by either of the supervisors to the shipowner about the presence of ice and/or snow on the containers.

At or about 7:45 p.m. when the last container from one of the vessel's hatches had been landed on the pier, the plaintiff and three other longshoremen were raised by a hi-lo in a safety box to the top of the container. The plaintiff's accident occurred after he had stepped from the safety box onto the top of the container and was walking toward one of the corners of the container in order to release a hook by means of which the container was attached to the lifting gear.

There was no evidence that the working conditions were unusual for that time of the year or that the stevedore contractor was incompetent or that the stevedore could not have conducted the discharge operation in safety with the exercise of ordinary care.

The trial court ruled that a rhetorical expression of irritation by one of the plaintiff's co-workers about the seasonal weather effects on the containers to an individual identified by the co-worker as the vessel's first mate and that a mere shrug of the shoulders by the so-called mate was sufficient to shift the responsibility for the conduct of the discharging operation from the stevedore to the shipowner.

At the trial, petitioner requested that the trial judge charge the jury that the shipowner's obligation to provide a safe place to work is not absolute and that when a shipowner has employed a stevedore to discharge its vessel, it has the right to assume that the stevedore will perform its service with reasonable safety. The trial judge refused this charge and a verdict for the plaintiff in the amount of $45,000.00, reduced by 10% comparative negligence, was returned. The defendant's motion for judgment *non obstante verdicto* was denied. (Appendix A) The Court of Appeals for the Scond Circuit affirmed with the informal opinion attached hereto in Appendix B.

Reasons for Granting the Writ

The Court should issue this Writ of Certiorari to resolve a conflict apparent on the face of the recent decisions of the Circuit Courts of Appeals which have endeavored to formulate a standard of care by which a shipowner's duty to a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act may properly be measured.[1] The issue of which standard of care would best implement the Congressional intent of developing uniform federal law in this area[2] is an important issue which has not been, but should be decided by this Court.

This petition will therefore present the conflict presently existing in the Courts of Appeals, examine the Congressional intent of establishing a uniform Federal Law concerning this issue and, lastly, present the dual error of the Court of Appeals in first applying the Second Circuit standard of care to this case, and, second, in not reversing the District Court and entering judgment *non obstante verdicto* as a matter of law under the facts and circumstances of the case *sub judice*.

POINT I

The conflicting decisions of the Courts of Appeals for the First, Second, Third, Fourth, Fifth and Ninth circuits must be resolved by this Court.

The conflicting decisions of the Circuit Courts of Appeals have prevented the effectuation of the Congressional intent in amending the LHWCA in 1972. The conflict has arisen from the failure of Congress to specifically define the standard of

---

[1] *Mattivi* v. *South African Marine Corp.*, 618 F. 2d 163 (2d Cir. 1980), *Giglio* v. *Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1978); *Hurst* v. *Triad Shipping*, 554 F. 2d 1237 (3rd Cir. 1977); *Rich* v. *United States Lines, Inc.*, 596 F. 2d 541 (3rd Cir. 1978); *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103 (4th Cir. 1977); *Chavis* v. *Finnlines, Ltd. O/Y*, 576 F. 2d 1072 (4th Cir. 1978); *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979); *cert. granted* ____U.S.____ (1980); *Bachtel* v. *Mammouth Bulk Carriers*, 605 F. 2d 438 (9th Cir. 1979) (Petition for Certiorari filed October 1, 1979).

[2] The intent of Congress is discussed in Point II, *infra*.

care by which a court may measure a shipowner's "negligence" as that term is used to define the liability of a shipowner to an injured longshoreman. The conflicting decisions are analyzed below.

A) The First Circuit

The appropriate standard of care applicable in a longshoreman's action against a vessel for personal injuries in the First Circuit is distinguished on the basis of the situs of the injury. *Anderson* v. *Iceland S.S. Co.*, 585 F. 2d 1142 (1st Cir. 1978) provides the law in cases where the injury has occurred on the pier. While not adopting Section 414A of the Restatement of Torts (Second) as the general rule to be applied in these cases, the Court clearly rejects the application of §343 and §343A of the Restatement holding:

> "We find [Sections 343 and 343A] inapplicable in a case . . . where the injury occurs elsewhere than the vessel."
>
> *Anderson, supra,* at 1149

More specifically, in determining who should properly bear the responsibility and liability for the condition of the cargo the Court stated:

> "The stevedore is hired for its expertise in handling cargo, including cargo which arrives from its journey in less than optimal condition."
>
> *Anderson, supra,* at 1151

This decision is in direct conflict with the Second Circuit's decision to apply §343A to the instant case where the condition of the cargo was caused by the vagaries of the weather, and the accident occurred on the pier. This conflict extends to a plurality of the circuits, who have either explicitly or implicitly adopted Sections 343 and 343A of the Restatement.[3]

---

[3] *See* discussion concerning the Second, Third, Fourth, Fifth and Ninth Circuits, *infra.*

The recent decision of the First Circuit in *Johnson* v. *A/S Ivarana Rederi*, 613 F. 2d 334 (1st Cir. 1980) enunciates the law to be applied in cases where the injury has occurred on the vessel. In its decision, the Court held that §§343 and 343A and all of the Restatements (Second) of Torts may be utilized in developing the standard of case under §905(b) "only when purged of concepts antithetical to the recognized purpose of §905(b)." *Johnson, supra* at 347. The standard of care that this case provides is that §905(b) imposes on the shipowner the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business, *Johnson, supra,* p. 346. In rejecting §343A the First Circuit relied heavily on the Ninth Circuit decision in *Santos* v. *Scindia Steam Navigation Co., Ltd.*, 598 F. 2d 480 (9th Cir.) *cert. granted,* _____ U.S. _____, 100 S. Ct. 77, _____ L. E. 2d _____ (1980). As indicated *infra,*[4] however, the *Santos* case will soon be under the scrutiny of this Court and the First Circuit's adoption thereof is pertinent to this petition only to the extent the First Circuit is in direct conflict with the Second Circuit's application of Section 343A to the case *sub judice.*

B) The Second Circuit

In the Second Circuit two principles of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* are well settled. As Congress intended[5] a shipowner shall be liable only where its negligence proximity caused the plaintiffs injury, *Giglio v. Farrell Lines, Inc.*, F. 2d (2d Cir. 1980) and this liability would be determined in accordance with land-based principles of negligence, *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976). In *Napoli, supra,* the Second Circuit adopted §343A of the Restatement of Torts (Second) which provides as follows:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on

---

[4] *See* note 18 and accompanying text, *infra.*
[5] *See* Point II *infra.*

> the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness" Restatement (Second) of Torts §343A(1) (1965).[6]

Thus, the standard of care applied in the Second Circuit is §343A of the Restatement (Second) of Torts which imposes liability on the shipowner for injuries arising from dangerous conditions on the vessel of which the shipowner is aware, *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F. 2d 861 (2d Cir-1977) but only where the shipowner should anticipate the longshoreman could not avoid the danger, *Mattivi* v. *South African Marine Corp.*, 618 F. 2d 163 (2d Cir. 1980).

Although decisions concerning an application of this standard of care to situations where both the stevedore contractor and the shipowner are aware of an allegedly dangerous condition have been inconsistent,[7] it is clear that the Second Circuit adopted §343A as the standard of care applicable to a shore side injury in the case *sub judice*. This application is in direct conflict to the First Circuit *Anderson*[8] decision which held specifically that §343A was inapplicable to accidents which occur elsewhere than the vessel.[9]

Besides being in direct conflict with the First Circuit, however, the decision in this case is in conflict with those decisions of the Third, Fourth, Fifth and Ninth Circuits which have developed a standard of care by which to measure the duty owed by a shipowner to a longshoreman.

---

[6]The application of this Section to an injury which occurred on the pier rather than the vessel is discussed in Point III, *infra*.

[7]*Compare Cox* v. *Flota Merchante Grancolombiana, S.A.*, 577 F. 2d 798 (2d Cir.) *cert. denied* 439 U.S. 881 (1978), *with Lopez* v. *A/S D/S Svendborg Line*, 581 F. 2d 319 (2d Cir. 1978).

[8]585 F. 2d 1142 (1st Cir. 1978).

[9]*See* Note 3 and accompanying text, *supra*.

As described more particularly in the following subsections of this Point, the present conflict among the Circuits is neither academic nor unimportant. Instead, because of this conflict the liability of the shipowner is determined by the Circuit in which the action is tried rather than by the facts of the individual case. This result, which vitiates the express wish of Congress[10] that a national standard of care be applied in longshoreman suits, may only be resolved by a decision by this Court.

C) The Third Circuit

The Third Circuit has held that the applicable standard of care is properly based on Section 409 of the Restatement of Torts (Second) and not on Section 343A. *Hurst* v. *Triad Shipping Co.*, 554 F. 2d 1237 (3rd Cir. 1977). Section 409 provides:

> "Except as stated in §§410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Restatement (Second) of Torts §409 (1965) *Hurst, supra* at 1250.

The decision in *Hurst* also held that the exceptions to the Rule of §409, contained in §§410-429 do not apply to longshoreman cases since they incorporate precisely the non-delegable duty which Congress sought to eliminate by the 1972 Amendments. *Hurst, supra* at 1251 referring to H.R. Rep. No. 1441, 92nd Cong. 2d Sess. (1972) *reprinted* in 3 U.S. Code Cong. and Admin. News pp. 4702-04 (1972), *see also* Restatement (second of Torts, Topic 2, Introductory Note at 394 (1965).

Of the remaining exceptions to the general rule of §409 the Court held only one could apply, viz.,

> §414 NEGLIGENCE IN EXERCISING CONTROL RETAINED BY EMPLOYER
>
> "One who entrusts work to an independent contractor, but

[10] *See* Point II, *infra.*

> who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Hurst, supra* at 1251. Restatement, (Second) of Torts §414 (1965).

In holding that the control retained by a shipowner over stevedore operations is not the degree of control to which §414 is directed the Third Circuit examined Comment C to §414 which provides:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

The standard of care adopted in *Hurst* has been recently reaffirmed. In *Rich* v. *United States Lines, Inc.*, 596 F. 2d 541 (3rd Cir. 1979) the Court examined a factual situation almost identical to that present here.[11]

In applying §414 the Court held that, ". . . the critical evidence needed to impose liability under Section 414 is that of the vessel owners control over the operative detail of the stevedores work." *Rich, supra,* at 550.

---

[11] In *Rich, supra,* the plaintiff slipped from an icy container *aboard* the vessel.

In dismissing the argument of the plaintiff that the shipowner may be liable to the plaintiff for failing to act independently of the stevedore the Court stated,

> "[the witness] indicated that the purpose of hiring the stevedore was to bring on board men who are experts in handling containerized cargo (transcript citation omitted). As a result, it is the stevedore and not the vessel owner who is most intimately familiar with the procedures to follow in order to safely load, unload and shift cargo and who is best able to assess the relative dangers its employees will face." *Rich, supra,* at 555.

After finding that since only the stevedore personnel were expected to walk on these containers and thus ice and snow on the same was no more the responsibility of the shipowner than a stevedore created condition, the Court went on to say,

> ". . . to hold [that] the vessel owner had an 'independent obligation' to alleviate this dangerous condition based only on his knowledge would thus impose a 'duty of supervision' on the vessel owner and would 'amount once again to the establishment of a non-delegable duty.' *Hurst* v. *Triad Shipping Co.,* 554 F. 2d at 1251" *Rich, supra,* at 556.

This independent obligation and duty of supervision is exactly what the Second Circuit has imposed on the petitioner in the case *sub judice*. Thus, had the instant case arisen in the Third Circuit, the petitioner would owe no liability to the respondent unless the petitioner was in control of the discharge operations. Since the evidence at trial demonstrates that the procedure and equipment used in this case were chosen by the respondent's employer and operated under the exclusive control of the employer's agents, with knowledge of the allegedly dangerous conditions, the petitioner would owe no duty to the respondent to alleviate these conditions in the Third Circuit. Consequently, the standard of care applied in the Third Circuit is in absolute and direct conflict with the standard of care adopted in the Second Circuit in the instant case.

D) The Fourth Circuit

The decision in the instant petition is also in direct conflict with the standard of care developed in the Fourth Circuit Court of Appeals' decision in *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103 (4th Cir. 1977). In *Riddle* the jury was given instructions almost identical to those denied to the petitioner in this case. These instructions provided that,

> ". . . the primary responsibility for the safety of the plaintiff and the other men engaged in making the repairs on the [vessel] rested upon the shipyard and not the shipowner." *Riddle, supra,* at 1109.

The Fourth Circuit affirmed the use of these instructions citing its earlier decisions[12] and reaffirming the principle that a shipowner is to be viewed as the employer of an independent contractor whose liability to injured longshoreman is consequently to be determined by land-based concepts of negligence, and not the legislatively discarded maritime concepts of non-delegable duty or seaworthiness.

Therefore, the Court held,

> "Applying land-based law, as declared in the Restatement the shipowner owes no duty to the [independent] contractor's employees . . . except in respect of concealed or hidden dangers known to him or which ought to have been known to him."

Thus, in the Fourth Circuit the shipowner has no duty towards a longshoreman for conditions which are "open and comprehensible to any reasonably careful man." *Riddle, supra,* at 1111. In the absence of any duty for open and obvious conditions there cannot be liability therefore.

---

[12] *Anuszewski* v. *Dynamic Mariners Corp., Panama,* 540 F. 2d 757 (4th Cir.), *cert. denied* 429 U.S. 1098, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977): *Bess* v. *Agromer Line,* 518 F. 2d 738 (4th Cir. 1975).

In adopting this standard the Fourth Circuit specifically examined the rule adopted in the Second Circuit in *Napoli, supra,* but disregarded it. Instead, the Court adopted a standard of care and a jury instruction which is in direct conflict with the standard and instructions adopted in the Second Circuit and applied in the case *sub judice.*

It is notable, however, that in considering the Second Circuit *Napoli* rule the Fourth Circuit also stated, *in dictum,*

> "even under the modern Rule [343A] a vessel is not liable for 'open and obvious' dangerous conditions, whether existing at (sic) time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard workers."*
> 563 F. 2d at 1111-1112. (Emphasis Added)

This standard was reaffirmed in *Chavis* v. *Finnlines, Ltd. O/Y,* 576 F. 2d 1072 (4th Cir. 1978).[13]

E) The Fifth Circuit

The present standard of care applicable in the Fifth Circuit was initially adopted in *Gay* v. *Ocean Transport & Trading Ltd.,* 546 F. 2d 1233 (5th Cir. 1977) and applied §342, §343 and §343A to suits brought under the amended LHWCA. *Brown* v. *Mitsubishi Shintaku Gingo,* 550 F. 2d 331 (5th Cir. 1977), *Hess* v. *Upper Mississippi Towing Corp.,* 559 F. 2d 1030 (5th Cir. 1977), *Briley* v. *Charente S.S. Co. Ltd.,* 572 F. 2d 498 (5th Cir. 1978) *Samuels* v. *Empressa Lineas Maritimas Argentinas,* 573 F. 2d 884 (5th Cir.), *cert. denied* 443 U.S. 915, 99 S. Ct. 3106, L. Ed. 2d (1979).

---

[13] *See also Harris* v. *Reederei,* 596 F. 2d 92 (4th Cir.), *cert. denied* U.S. , 100 S. Ct. 77 (1980).

The subsequent decisions of the Fifth Circuit have, however, refined the application of the Restatement to longshoreman suits and developed the present conflict existing between the Fifth and Second Circuits.

In the Fifth Circuit the shipowner is not liable where the condition which gives rise to an accident is open and obvious and within the stevedore contractor's ability to correct. *Hess* v. *Upper Mississippi Towing Corp.*, 559 F. 2d 1030 (5th Cir. 1977), *Briley* v. *Charente S.S. Co., Ltd.*, 572 F. 2d 498 (5th Cir. 1978).

This standard was most recently reaffirmed in *Roberts* v. *Andrew Martin Sea Services, Inc.* No. 78-2219, Slip Op. 5932 (5th Cir. May 30, 1980) where a longshoreman was injured due to rough weather which caused waves to wash over the area where he was working. The Court held that the weather conditions were open and obvious to the longshoreman's employer upon whom the primary responsibility for the longshoreman's safety rested. Thus, even if the shipowner was aware of the condition, the stevedore contractor remained under a duty to act to protect its employee and its failure to do so was the proximate cause of the plaintiff's injury.

Thus, had the facts of the instant case arisen in the Fifth Circuit, the proximate cause of the respondent's injury would have been determined, as a matter of law, to have been the stevedore contractor's failure to eliminate the allegedly dangerous condition of which it was aware and over which it exercised active control. Since Congress never intended that the liability of a shipowner be determined by the situs of the injury, the conflict among the circuits which caused the differing results referred to above must be resolved by this Court.

F) The Ninth Circuit

As early as 1960 the Ninth Circuit had articulated the specific issue which has created the present conflict among the circuits. In that year the Ninth Circuit decided *Hugev* v. *Damp-*

skisaktieselskabet International,[14] and in doing so affirmed the opinion of the trial judge as correctly deciding the issues concerning the duties owed between shipowner and stevedore.[15]

In an opinion which appears to have anticipated the present conflict, the court described the inherently dangerous conditions a vessel returning from sea would normally present and adopted the following as the standard of care owed by the shipowner to the stevedore employer;

> "(1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and
>
> (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract." *Hugev,* 170 F. Supp. at 610.

The persuasive reasoning of the *Hugev* decision remained the

---

[14] 170 F. Supp. 601 (1959), *aff'd. sub. nom., Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International,* 274 F. 2d 875 (9th Cir.) *cert. denied* 363 U.S. 803 (1960).

[15] Since this case was decided prior to the 1972 Amendments the decision concerned the duties owed between the ship and the stevedore as opposed to the duties owed between the ship and the plaintiff.

standard of care in the Ninth Circuit until the recent decision of *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir.) *Cert. Granted,* U.S. (1980). The standard adopted in *Santos* provides as follows:

> "A vessel is subject to liability for injuries to a longshoreman working on or near the vessel caused by conditions on the vessel if but only if, the shipowner
>
> a) knows of or by the exercise of reasonable care would discover the conditions and should realize that it involves an unreasonable risk of harm to such Longshoreman, and
>
> b) the shipowner fails to exercise reasonable care under the circumstances to protect the Longshoreman against the danger." 598 F. 2d at 485.

This standard is not supported by either the legislative history of the Amendments[16] or the vast body of Post Amendment decisions which have properly recognized the right of a shipowner to delegate active control of the vessel to the independent contractor.

In determining whether *Hugev, supra* or *Santos, supra* represents the prevailing standard of care in the Ninth Circuit it must be noted that the *Santos* decision, which adopted a standard of care in full recognition of its conflict with the Second, Fourth and Fifth Circuits,[17] will soon be reviewed by this Court.[18]

The standards of care adopted by the First, Third, Fourth, Fifth and Ninth Circuit Courts of Appeals are in direct conflict with each other and with the instant Second Circuit case. The uniformity intended by Congress can only be effectuated by a resolution of this conflict by this Court.

---

[16] *See* Point II, *infra.*

[17] *Santos, supra,* at 486-487, *see also Bachtel* v. *Mammouth Bulk Carriers,* 605 F. 2d 438 (9th Cir. 1979) petition for certiorari filed October 1, 1979.

[18] *Santos, supra, cert. granted* _____ U.S. _____ (1980).

POINT II

Congress intended that negligence under the LHWCA be uniformly defined as a matter of federal law.

The importance of resolving the conflicting decisions of the Circuit Courts of Appeals referred to in Point I, *supra*, is reflected in the report of the House Committee on Education and Labor concerning the 1972 Amendments to LHWCA.[19]

That Congress intended a uniform definition of "negligence" is evident;

> ". . . the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal Law."[20]

Similarly, this Court has stated,

> ". . . Federal admiralty law should be a 'system of law coextensive with and operating uniformly in the whole country' the Lottawanna, 21 Wall 558, 575, 22 L. Ed. 654, 662 (1875)" *Morange v. States Marine Lines*, 398 U.S. 375, 357 (1970).

In endeavoring to comply with this intention the various Circuit Courts have adopted various sections of the Restatement of Torts, (Second), derivations thereof, or have developed an independent standard of care. It remains, however, for this Court to determine which standard properly effectuates the announced

---

[19]S. Rep. 92-1125, 92nd Cong. 2d Sess. 12; H.R. Rep. No. 92-1447, 92nd Cong. 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Admin. News 4698.

[20]H.R. Rep., *supra*, note 19 at 4705.

intent of Congress to develop a uniform federal definition of the term "negligence" in the amended LHWCA.

The respective sections of the Restatement and specifically §343A[21] are too narrowly drawn to adequately fulfill this objective. Rather what is required is a national standard of care developed by this Court in light of the purpose of the 1972 Amendments.

POINT III

Section 343A of the Restatement (Second) of Torts does not properly apply to this case.

Section 343A is inapplicable to the facts and circumstances of the case *sub judice* for two reasons. First, Section 343A does not reflect the Congressional intent in amending LHWCA in 1972, and second, assuming *arguendo* that §343A does apply to a longshoreman suit, it is inapplicable where the injury does not occur on the vessel. These points are discussed seriatim.

A) Section 343A is inapplicable to the purpose of LHWCA as amended in 1972.

In amending the LHWCA in 1972 the Congress intended to,

> "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore."[22]

Specifically, the Committee stated,

> "The Committee intends that the vessel shall not be liable . . . failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances."[23]

---

[21] *See* Point III, *infra*.
[22] H.R. Report, *supra*, note 19 at 4704.
[23] H.R. Rep., *supra*, note 19 at 4704.

The *quid pro quo* for these changes was the establishment of an adequate compensation plan with the burden of providing for the safety of the longshoreman economically placed upon the stevedore employer. The purpose of placing the burden on the stevedore employer was to ". . . strengthen the employers incentive to provide the fullest measure of on the job safety"[24] while the legal effect intended was to assure

> "that a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work, Ang. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman S.S. Corp. 336 F. 2d 367,"[25] [or] for gear or equipment of stevedores . . . whether used aboard ship or ashore . . ."[26]

Section 343A of the Restatement of Torts (Second) does not effectuate these announced policies. While §343A may demonstrate the land-based common law of duties of a landowner to an invitee, it does not represent the land-based common law of the duties of a land-owner to the employee of an independent contractor employed by the land-owner. Instead, Section 409, adopted in the Third Circuit[27] provides the Common Law applicable to the land-based situation most analogous to the *shipowner-stevedore* situation presented in the typical longshoreman suit. Section 409, as opposed to §343A takes into account the expertise of the independent stevedore in performing longshoring operations. More importantly, Section 409 provides for the proper legal effect the shipowners renunciation of control over the longshoring operations to the professional stevedore should have whereas Section 343A does not. Section 343A assumes the continued control over the land by the landowner and thus imposes a continuing duty on the landowner to protect invitees from dangerous conditions on the land where the landowner reasonably anticipates the invitee will not be able to avoid

---

[24] Ibid. at 4699.
[25] Ibid. at 4703.
[26] Ibid. at 4703.
[27] *See* notes 11 and accompanying text, *supra.*

the harm. This continued control to which §343A is directed is not maintained by a shipowner when longshoring operations commence. Rather, the shipowner employs the stevedore as a professional independent contractor for the express purpose of loading or unloading the shipowners vessel. In doing so, the shipowner relinquishes control of the stevedores work area and delegates to that independent contractor the exclusive control and supervision of the longshoring operations. This delegation of control is precisely the situation envisioned by Congress in amending LHWCA. To impose §343A which vitiates any legal effect of this delegation of control is to forbid to the shipowner that which Congress specifically permitted, viz,

> "The purpose of the amendments is . . . not to endow [the longshoreman] with any special maritime theory of liability or cause of action . . . such as unseaworthiness [or] non-delegable duty."[28]

Section 343A, however, as interpreted by various decisions of the Second Circuit,[29] effectively imposes on the shipowner an "independent obligation"[30] to the operation of the stevedore employer and thus reduces the shipowners delegation of control to a legal nullity. Those decisions of the Second Circuit which recognize the Congressionally intended right of a shipowner to delegate control to the stevedore employer and rely on the expertise of the stevedore in performing its duties are more properly derived from §409 and not §343A.[31]

---

[28] H.R., *supra*, note 19.

[29] *i.e. Napoli* v. *Hellenic Lines Inc.*, 536 F. 2d 505 (2nd Cir. 1976); *Lubrano* v. *Royal Netherlands Steamship Corp.*, 572 F. 2d 364 (2d Cir. 1978); *Lopez* v. *A/S D/S Svendborg*, 581 F. 2d 319 (2d Cir. 1978); *Cannizzo* v. *Farrell Lines, Inc.*, 579 F. 2d 682 (2d Cir. 1978).

[30] *Rich* v. *United States Lines Inc.* 596 F. 2d 541 (3rd Cir. 1979).

[31] *Munoz* v. *Flota Merchante Grancolombiana* 553 F. 2d 837 (2nd Cir. 1977) *Cox.* v. *Flota Merchante Grancolombiana*, 557 F. 2d 798 (2d Cir. 1978); *Giglio* v. *Farrell Lines Inc.*, 613 F. 2d 429 (2d Cir. 1980); *Mattivi* v. *South African Marine Corp., Inc.*, 618 F. 2d 163 (2d Cir. 1980); *Lubrano* v. *Royal Netherlands Steamship Co.*, No. 79-7228, Slip op. 2163 (2d Cir., March 31, 1980).

Since Section 343A of the Restatement (Second) of Torts, does not reflect the intention of Congress in amending the LHWCA to impose liability on a shipowner only for the shipowners failure to exercise ordinary care it was error for the Second Circuit to have applied it to the facts and circumstances of this case.

B) Section 343A cannot properly apply to an injury which did not occur on the vessel.

Section 343A applies to, ". . . any activity or condition *on the land* . . ."[32]

As referred to above, this Section assumes the landowner controls the activities or conditions on the land or by the exercise of ordinary care could control said activities or conditions.

The pier, however, is in the absolute and exclusive control of the stevedore employer and the issue of permissible delegation of control or its effect cannot properly apply to an injury where the stevedores control is initially exclusive and absolute.

Instead, the facts of this case demonstrate the allegedly dangerous condition was not created by the shipowner-defendant nor did the injury occur on the vessel. The plaintiff's injury occurred on a pier, due to a condition over which the petitioner had no control. Furthermore, although the allegedly dangerous conditions were admittedly known to the respondent's immediate supervisors, neither of them complained to the petitioner that the condition was dangerous and neither of these supervisors requested that work be interrupted or the condition alleviated. In fact, the testimony at the trial showed that icy ~~conditions~~ containers had been removed from the ship earlier that day and that it was customary for containers to become icy at that time of year. Both the plaintiff and his supervisors were aware of these conditions and the means by which the conditions could be alleviated if they were considered dangerous. The stevedore super-

[32] Restatement (Second) of Torts §343A, (emphasis added).

visors, however, chose to ignore CFR §1918.91(c) which requires the stevedore to eliminate slippery conditions as they occur and continued the work without interruption. The petitioner took no part in this decision and was not informed by the stevedore employer nor could it reasonably assume from the stevedore employer that this decision would place the stevedore employees in a position of harm they could not reasonably be expected to avoid. To impose liability on a shipowner for injuries allegedly arising from a condition which the shipowner did not cause and could not control is to ignore the purpose of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act and return to the Congressionally discarded theory of unseaworthiness in a longshoreman's suit.

Consequently, it was error for the Second Circuit Court of Appeals of affirm the decision of the United States District Court for the Southern District of New York which applied §343A to the facts of this case to deny petitioner's motion for summary judgment *non obstante verdicto.*

CONCLUSION

Since Congress amended the Longshoremen's and Harbor Workers' Compensation Act in 1972 to eliminate the doctrine of unseaworthiness and limit a shipowner's liability to longshoremen to only those injuries resulting from the shipowner's negligence, the Courts of Appeals and the District Court have endeavored to formulate a standard of care by which this negligence could be measured and the purpose of the amendment implemented.

The conflicting decisions which have arisen from these endeavors now present an important question of federal law, which has not been, but should be decided by this Court. The traditional rule, and the specific intent of Congress, is that uniformity be sought in federal admiralty law. Only a definitive decision by this Court will properly insure that this tradition be effectuated.

For the foregoing reasons counsel for the petitioner submit that this Court should grant a Writ of Certiorari to review the decision of the Second Circuit Court of Appeals and consolidate this case with any other cases in which petitions for writs of certiorari are filed raising the same standard of care issue.

Respectfully submitted,

VICTOR S. CICHANOWICZ
Counsel for Petitioner

CICHANOWICZ & CALLAN
WILLIAM P. BYRNE, Esq.
Of Counsel

APPENDIX A—Opinion of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAM IRIZARRY, *Plaintiff,* *against* COMPANIA MARITIME NAVEGACION NETUMAR, S.A., *Defendant.*	79 Civ. 540 (RJW)

Defendant moves pursuant to Rules 50(b) and 59, Fed. R. Civ. P., for an order granting judgment notwithstanding the verdict and for a new trial and to reduce the jury verdict of $40,500 as excessive. For the reasons hereinafter stated, the motion is denied.

In a complaint filed on January 31, 1979, plaintiff sought damages for injuries allegedly sustained on February 1, 1977 while he was working as a longshoreman. Plaintiff claimed that he slipped and fell approximately eight feet from the ice-covered top of a container which had just been unloaded from defendant's vessel, the M/V Diana, and that he sustained a laceration near his left eye and injured his right shoulder, wrist, ankle and back. He incurred medical expenses of $1,545 and lost 18 weeks from work resulting in lost wages of $7,200. After trial, the jury found plaintiff had sustained damages of $45,000, reduced the damages by 10% due to plaintiff's contributory fault and, as noted above, awarded him $40,500.

Defendant contends that it was surprised at trial when plaintiff called a witness not identified in his deposition, in his answers to interrogatories, or in the pre-trial order. The witness

was Nicholas Esposito, a fellow longshoreman. Esposito's testimony was important since it established the requisite notice to the vessel's first mate of the ice on the top of the container. Plaintiff's counsel contends that he did not discover the witness until shortly before the trial, at which time he notified defendant's counsel of his intention to call him.

At a conference with the Court prior to trial, counsel for defendant objected to plaintiff's calling Esposito. It appeared that in the event Esposito was precluded from testifying, a dismissal for lack of notice was virtually certain. Faced with this likelihood, the Court indicated that it would permit Esposito to testify, subject to permitting defendant's counsel either to defer his cross-examination or to request a continuance to allow defendant to meet Esposito's testimony. At trial, defendant chose to proceed immediately to cross-examine the witness and did not request a continuance either at that time or prior to resting.

It is defendant's contention that a "manifest injustice" was done by allowing Esposito to testify, that defendant was "surprise" and that the result was a large and unexpected verdict. Defendant urges that "to prevent manifest injustice," the judgment should be vacated and a new trial granted. Defendant also contends that although there were medical expenses of $1,545 and lost wages of $7,200, the verdict was excessive and should be set aside or at least reduced.

The first issue presented by defendant's contentions is whether the Court abused its discretion in permitting Esposito to testify. The Court recognized that, on the one hand, if Esposito was not permitted to testify, a dismissal based on lack of notice would undoubtedly have followed. On the other hand, permitting him to testify without his having been identified earlier deprived defendant of the opportunity to take his deposition before trial and to check or rebut his story. Faced with this choice, the Court permitted Exposito to testify and have defendant's counsel the aforementioned options. Defendant, however, exercised neither of these options. Having chosen not to defer his cross-examina-

tion of the witness or to request a continuance, defendant cannot now have a second bite at the apple by obtaining a new trial.

One of the principal objectives of the pre-trial order required by Rule 16, Fed. R. Civ. P., is to keep the use of surprise tactics to a minimum. Yet it is without question, and Rule 16 so provides, that a district court may in its discretion modify a pretrial order at trial if justice requires. *Clark* v. *Pennsylvania R. Co.*, 328 F. 2d 591, 594 (2d Cir. 1964). Indeed, even where, unlike here, a party acting in bad faith "springs a surprise witness on his adversary in defiance of the terms of a pre-trial order," a district court may still permit the witness to testify and grant the opposing party a continuance. *Id.* at 594-595. In this case, defendant chose not to avail itself of the opportunity for a continuance offered by the Court.

The second issue raised by defendant is whether the verdict is excessive and should be set aside or reduced. On the basis of the evidence introduced at trial, including the testimony of plaintiff and his physician, a jury could reasonably have concluded that plaintiff sustained a permanent injury to his right shoulder that will, in the future, prevent him from performing strenuous tasks in the court of any employment involving lifting. In light of the evidence that plaintiff experienced extreme discomfort following his injury and continues to experience pain in his right arm when he lifts things, it cannot be said that the jury's award of $40,500 was grossly excessive, particularly when it is discounted over the remainder of this 35-year-old plaintiff's expected life span. *See Dagnello* v. *Long Island R.R. Co.*, 289 F. 2d 797, 806 (2d Cir. 1961). Accordingly, defendant's motion is in all respects denied.

It is so ordered.

Dated: New York, New York
November 9, 1979

ROBERT J. WARD
U.S.D.J.

APPENDIX B—Opinion and Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of April, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN,
Chief Judge

HON. JAMES L. OAKES,
Circuit Judge

HON. HUBERT L. WILL,
District Judge sitting by designation

79-7876

SAM IRIZARRY,
Plaintiff-Appellee,

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.
Defendant-Appellant.

Docketed as
a Judgment #80-0616
on 5/22/80

Appendix B—Opinion and Judgment of the Court of Appeals.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. In this suit by a longshoreman employed by an independent stevedore, Sealand Terminals, against the owner of the vessel, the M.V. Diana, appellee claimed to be injured when he fell from a container that had just been unloaded from the vessel. There was evidence at trial from which the jury could have concluded that appellee's job required him to walk across the top of the container to detach the cables by which it had been hoisted from the vessel's hold, that he slipped due to ice and slush on the top of the container that had accumulated before the ship reached port, and that the vessel had actual notice of this condition.

2. Under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §905(b), a shipowner is not liable to a longshoreman for physical harm caused by any condition whose danger is known or obvious to the longshoreman, unless the shipowner should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts §343A; *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976). Both notice to the shipowner and the necessity for Irizarry to walk across the container are established by the evidence. Moreover, this case is not controlled by *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364 (2d Cir. 1978) where unsafe conditions were caused by and under the control of the stevedore and longshoremen, rather than the shipowner. As a majority of the panel in

Giglio v. *Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1980) recognized, 29 C.F.R. 1918.91(c) ("Slippery conditions shall be eliminated as they occur.") does not relieve the vessel "from responsibilities or duties now placed upon them by law, regulation or custom." 29 C.F.R. §1918.2(b). Moreover, the Joint Maritime Safety Code, Part C, §1 provides, "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

3. The appellant's final claim of error is that the district court erred in amending its pretrial order to permit a key witness, Nicholas Esposito, to testify, despite lack of prior notice to the shipowner. In light of the fact that the trial court found that the omission of Esposito's name was not in bad faith, and further offered to grant appellant a continuance to mitigate any resulting prejudice, we cannot say that the district court's decision to amend its order and permit Esposito to testify constituted an abuse of discretion. *Clark* v. *Pennsylvania Railroad Co.*, 328 F. 2d 591 (2d Cir. 1964).

IRVING R. KAUFMAN,
Chief Judge.
JAMES L. OAKES,
Circuit Judge
HUBERT L. WILL,
District Judge

JUDGMENT ENTERED
A true copy,
A. DANIEL FUSARO
Clerk

No. 80-94

AUG 15 1980

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

—against—

SAM IRIZARRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MORRIS CIZNER
Counsel for Respondent
160 Broadway
New York, New York 10038

Questions Presented

Where the facts in evidence and as found by the jury, namely: That Petitioner's ship came into port covered with snow and ice and containers in the hold blanketed with ice; that the longshoremen were required to walk on top of containers and unhook same when landed on the stringpiece of the pier and so could not avoid the dangerous condition; that ice on top of the container was extremely hazardous; that by custom and practice shipowner had the duty and the ship's crew was required to clean off the ice and to make the place of work reasonably safe; that the longshoremen were never required to nor did they clean off the ice; that when complaints were made to the ship's First Mate about the dangerous conditions he shrugged, walked away, and the ice was never removed.

The questions presented are:

1. Should the verdict be disturbed on appeal where the jury found shipowner failed to exercise reasonable care under these circumstances and was negligent?

2. Where shipowner does not take exception to the jury charge, should there be a reversal on appeal because of possible theoretic differences between the Circuits as to ship's duty derived from standards of care, when:

> (a) There is no conflict under the facts presented and the ship's duty was derived from custom and practice in the Port of New York and not from the "standard of care", and
>
> (b) On the facts in evidence as presented to the jury there is no conflict between Circuits and plaintiff would recover damages in any Circuit.

3. Is shipowner relieved of liability for their negligence when they turned over to longshoremen a hatch with cargo of containers then in an icy, dangerous condition which causes injury to a workman when shipowner could not rely on stevedore correcting the condition since by practice and custom ship's crew had sole responsibility for removing the ice?

4. Since the Federal Safety Regulations require that slippery conditions be eliminated as they occur and the icy condition on the container tops occurred prior to the longshoremen boarding the vessel, should the shipowner be considered in violation of such regulation here?

5. Should this court disagree with and overrule the Supreme Court holding in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) so that any negligence on the part of stevedore relieves shipowner of their liability for their negligence?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities iv

I. Statement of the Case 1

1. Facts 1

2. The Charge to the Jury 6

3. The Opinion of the Circuit Court 8

II. Reasons for Denying the Petition for a Writ of Certiorari 9

1. The Modern View of the Law as Applied in the Second Circuit 9

2. The Non-Existent Conflict Between Circuits Under the Facts Presented 16

III. Conclusion 24

Appendix I—

Pertinent Portion of the Charge to Jury 1a

Table of Authorities

Cases:

Anderson v. *Iceland Steamship Company*, 585 F. 2d 1142 (1 Cir. 1978) 17
Anuszewski v. *Dynamic Mariners Corp. Panama*, 391 F.Supp. 1143 (D.Md. 1975), *aff'd* 540 F.2d 757 (CA4 1976) 12

Bachtel v. *Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979) 11
Bess v. *Agromar Line*, 518 F.2d 738 (4 Cir. 1975) 22

Darwin v. *United States*, 435 F.Supp. 501 (N.D.Cal. 1977) 12
Delos Santos v. *Scindia Steam Navigation Co., Ltd.*, 598 F.2d 480 (9th Cir.) 18, 19, 22, 23
Denny v. *Jugoslavenska Oceanska Plov*, 455 F.2d 1277 (CA5 1972) 12

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) ..... ii; 7, 13, 14, 19, 21

Gay v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5 Cir. 1977) 22
Giglio v. *Farrell Lines, Inc.*, 613 F.2d 429 (2d Cir. 1980) 8, 9, 12
Griffith v. *Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3 Cir. 1979) 20, 21, 22, 23

Hugev v. *Dampskisaktieselskabet International*, 170 F.Supp. 601 aff'd 274 F.2d 875 (9 Cir.) cert. den. 363 U.S. 803 (1960) 20
Hurst v. *Triad Shipping Co.*, 554 F.2d 1237 (3 Cir.) cert. den. 434 U.S. 861 (1977) 20

PAGE

Johnson v. *A/S Iverans Rederi*, 613 F. 2d 334 (1 Cir. 1980) 12, 18, 19

Kermarec v. *Compagnie General Transatlantique*, 358 U.S. 625 (1959) 13, 14, 19

Lopez v. *A/S D/S Svendborg*, 581 F. 2d 319 (2 Cir. 1978) 9

Napoli v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976) 8, 9, 15, 21

Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo*, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965) 24

Rich v. *United States Lines*, 596 F.2d 541 (3 Cir. 1979) 20

Other Authorities:

29 C.F.R. §1918.2(b) 8, 13

33 U.S.C. §941 11

Joint Maritime Safety Code Part C, §1 ..... 8, 12

Prosser, Law of Torts, 4th Edition Chap. 10, par. 61 pp. 394-395 10

Restatement (Second) of Torts §343A 8, 9, 15, 16, 17, 18, 19, 22

Restatement of Torts, Second, Secs. 343-343A 19, 21, 23

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-94

COMPANIA MARITIME NAVEGACION NETUMAR, S.A.,

Petitioner,

—against—

SAM IRIZARRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

I.

Statement of the Case

1. *Facts*

The Petition here should be denied since it is based upon misstatements of fact and serious errors in law. Petitioner tailors the facts to fit the law as they would like it to be and then ask this Court to overrule the Supreme Court and change the law to their liking.

The Petitioner's "facts" are substantially different in content and import from those facts ascertained from the trial record by the Trial Court (see charge to the jury in Appendix 1, Respondent's Brief) as well as by the Circuit Court as set forth in their opinion (Appendix B to the Petition 4a-6a).

This case involves a working surface which was icy and slippery and so supplied and provided by shipowner to

longshoremen who had to perform their work thereon. The container tops were so slippery that at times the men would have to crawl on their knees. The condition was not created by the longshoremen but was in existence at the time the longshoremen came on board to perform their work of unloading the vessel.

The dangerous condition did not arise as a result of the work of handling of cargo by the longshoremen. They were on board to load and unload and not to do housekeeping nor to correct the dangerous conditions on board defendant's vessel. The expertise of stevedores for which they were hired did not play any part in the creation of the hazard. The testimony shows that it was the ship's crew that was required to remove the ice on the containers and not the duty of the longshoremen to do so.

The longshoremen did not undertake to correct the condition but looked to the shipowner to do so. Complaints were made to the First Mate about the slippery condition but "He looked at me and he looked at the containers and he shrugged his shoulders and he walked away."

The jury found that shipowner did not act in a reasonable manner under the circumstances and that it was negligent. It also found that shipowner had either actual or constructive notice of the conditions complained of.

Despite the foregoing, shipowner asserts distortedly that plaintiff should not succeed.

The testimony was simple. Plaintiff, a longshoreman, was injured on February 1, 1977 at about 7:45 P.M. while on top of a container which was being discharged from Hatch No. 1 of defendant's vessel. The container top was slippery with ice. He slipped and fell on the container and then down to the stringpiece of the pier sustaining injuries.

The container was a box, 20 feet by 8 feet by 8 feet. It had eyes at each corner into which hooks would fit. To discharge the container, four 20-foot wires with a hook at the end of each was used. These hooks fit into the eyes of the container and all four wires were connected to the cargo hook. The container would be taken out of the hatch and landed on the stringpiece of the pier. In order for it to be hooked up for removal off the ship, the longshoremen had to go on top of the containers. When landed on the stringpiece, the longshoremen had to walk on top of the containers to take off the hooks.

When the ship came into New York it was full of snow and ice. The containers on the deck had snow thereon. The containers below deck had ice and slush on them. After removing the containers on deck, at about 5:00 P.M. the hatch was opened. There was ice, broken ice and water on top of these below deck containers.

When the hatch was opened, the First Mate was standing on deck looking down onto the containers.

It was the ship's duty to clean the ice and snow off the containers. It was the longshoremen's job to load and unload the ship. They had nothing to do with the removal of snow and ice on board. The longshoremen never remove snow or ice from the containers or anywhere else.

When the hatch was opened the conditions on the containers were very hazardous, icy and slippery. The containers had a blanket of ice.

When the containers below deck were seen, a witness testified that he complained to the First Mate. He testified:

"Q. What was he doing when you complained to him?

A. He was standing and he was looking in the hatch.

Q. What did you say to him?

A. I said—I said, 'What are we supposed to do, work like this, with this snow and ice?', and we have to get on these containers which they're sometimes four high. It's a 40-foot fall if you fall. It's very hazardous. I said, 'How are we supposed to walk on them?'

Q. What did he say, if anything?

A. He looked at me and looked at the containers and he shrugged his shoulders and he walked away.

Q. Did you tell me approximately what time of the day this was?

Q. Well, I could not be sure. It was towards the evening or late afternoon.

Q. Did you do this on one occasion or on more than one occasion?

A. Other than one occasion." (Trial Transcript 54-55)

(It is this that the Petitioner, from the safety of his office, characterizes as "a rhetorical expression of irritation" about seasonal weather effects, and erroneously claims that the lower court held the shrug to be sufficient "to shift the responsibility for the conduct of the discharge operations"—p. 4 Petition. Such position is pure fantasy.)

The dangerous condition of the ice and snow on the container tops was open and obvious. Complaints were not made to the Hatch Boss because it was an obvious condition and the latter saw it.

In removing the container from the ship, it was placed on the stringpiece alongside the ship to be unhooked. When plaintiff went onto the container for that purpose, he took three steps, slipped and fell thereon and then fell down onto the stringpiece.

Shipowner argues that they engage stevedores such as plaintiff's employer "to load and unload cargo" from their vessel. Once more it becomes necessary to point out that the use of the container top as a walking and working surface is not loading and unloading cargo. It is not the handling of cargo but the performance of housekeeping chores that is involved.

Shipowner's denial that they have any control where longshoremen work is fallacious. They furnished an unsafe place of work and by doing so they violated their duty that they owed to plaintiff. For them now to claim that they delegated their duty to stevedore is incredible. If stated correctly, they claim the ship can delegate its responsibility or liability for the consequences of its violation of its duty. When they speak of a non-delegable duty equal to the warranty of seaworthiness they are distorting the facts and law. They cannot delegate their liability for their own negligence.

In our case it is the shipowner that was and is in the best position to prevent the dangerous conditions from arising again and similar accidents from occurring. It is they who were in control of the vessel and its cargo when the condition was created. They knew that unless some special precautions were taken that on a winter crossing ice would form on the cargo and longshoremen would have to walk thereon. Such knowledge should have brought forth a more positive attempt by shipowner to "control the conditions". They could have insulated their holds to a greater and better extent; could have covered the cargo with canvas or tarpaulins; could have spread non-skid material on each container before ice formed thereon; could have placed non-skid material on the cargo after the ice formed; could have made inspections to ascertain the condition, corrected same or at least warned the long-

shoremen; and the like. Obviously shipowner was in the best position to prevent the accident from occurring. They did none of the foregoing.

2. *The Charge to the Jury*

The Court charged the jury* that plaintiff must prove that the accident occurred in the manner claimed by him; that the defendant was negligent and its negligence was the proximate cause of the accident. Negligence was defined as the doing of some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the same or similar circumstances. It is the failure to use ordinary care under the circumstances.

The jury was charged that the plaintiff had to prove the claimed manner of the happening of the accident which was as follows:

Plaintiff was required to work on top of a container; that he slipped and fell because of ice and melting slush on the top of the container; that the ship's crew had failed to remove the ice and slush; that he was injured because the shipowner breached its duty to provide him with a safe place to work. He claimed that the ship's First Mate knew that there was ice and slush on the tops of the container which were being unloaded from the ship and shipowner should have removed same. Its failure to do so was a violation of its duty to supply him with a reasonably safe place to work.

The Court reiterated in its charge that shipowner would be liable for unsafe working conditions of which it was or should have been aware and for any negligence by the

---

* Pertinent portions of the charge to the jury are reproduced in Appendix 1 annexed to this brief in opposition.

ship's crew; that plaintiff must establish that the Mate knew that the ice and slush was on the top of the container and negligently failed to have it removed; that the ice had been on the top of the container for such a period of time that it should have been discovered and removed by the ship's crew in the exercise of reasonable care under the circumstances; that plaintiff contends that prior to the accident a witness advised the Mate of the presence of ice on the containers and that the Mate shrugged and walked away. If the jury believed the testimony of this witness, they could find that shipowner knew that there was ice on the container and its failure to remove same may be considered negligence for which shipowner would be liable.

The jury was charged that plaintiff did not assume the risk of his employment if the injury resulted from the negligence of shipowner. Comparative negligence was charged.

Following the charge, shipowner's counsel stated it had *"no exceptions"* thereto.

Shipowner requested a further charge that by ". . . employing the stevedore to discharge the vessel that the stevedore has certain responsibilities under the law which shipowner has a right to assume that the stevedore will perform." The Trial Court refused to so charge as *Edmonds* v. *Compagnie Generale Transatlantique, supra,* holds that the negligence of the shipowner stands on its own two feet and that such a charge would not be correct as a matter of law; and that it would confuse the jury.

The Court might have also added that the requested charge in the language used was irrelevant to the issues; that the negligence of the stevedore should not be imputed to the plaintiff; and that since shipowner and stevedore are concurrently negligent here, the only question is,—did shipowner exercise reasonable care under the circumstances?

3. *The Opinion of the Circuit Court*

The Circuit Court affirmed the court below stating that there was evidence from which the jury could have concluded that:

1. Plaintiff's job required him to walk across the top of the container; 2. He slipped due to ice and slush on the top of the container that had accumulated *before* the ship reached port; and 3. The vessel had actual notice of this condition.

The Court then stated that a Shipowner is not liable to a longshoreman

> "for physical harm caused by any condition whose danger is known or obvious to the longshoreman, unless the shipowner should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts §343A; *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Both notice to the shipowner and the necessity for Irizarry to walk across the container are established by the evidence." (5a)

The Court pointed out that the dangerous condition involved here was *not* caused by and under the control of the stevedore and longshoremen. That

> "*Giglio* v. *Farrell Lines, Inc.*, 613 F.2d 429 (2d Cir. 1980) recognized, 29 C.F.R. 1918.91(c) ("Slippery conditions shall be eliminated as they occur.") does not relieve the vessel "from responsibilities or duties now placed upon them by law, regulation or custom." 29 C.F.R. §1918.2(b). Moreover, the Joint Maritime Safety Code, Part C, §1 provides, "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment,

tools and *work spaces* which are to be used in stevedoring operations." (6a)

II.

Reasons for Denying the Petition for a Writ of Certiorari.

1. *The Modern View of the Law as Applied in the Second Circuit*

The decision of the circuit court in our case is based upon *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2 Cir. 1976); *Lopez* v. *A/S D/S Svendborg*, 581 F. 2d 319 (2 Cir. 1978); and dissenting opinion of Judge Oakes in *Giglio* v. *Farrell Lines Incorporated*, 613 F. 2d 429 at 436-438 (2 Cir. 1980).

In *Napoli*, plywood on deck cargo had snow thereon and hence, was slippery. Plaintiff had to stand and walk on it in connection with the performance of his work as signalman. He slipped and fell. The Court stated:

> "[8] As we proceed with our task of adopting appropriate land-based principles of negligence for application under the LAHWCA, we would be lacking in wisdom if we turned our backs on the changes which increased social awareness has brought about in traditional concepts of liability. Accordingly, we believe that where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in § 343A of the Restatement of Torts above quoted." (509)

The Court rejected the *Traditional* interpretation of Sec. 343A since that incorporated contributory negligence as a

bar to the action and charged the injured with assumptions of risk.

Eliminating these restrictions, the Court applied the *Modern* view as set forth in Comment—subpar. (f) under sec. 343A. See also Prosser, Law of Torts, 4th Edition Chap. 10, par. 61 pp. 394-395. The court stated:

> "[5] Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it. For instance, his attention may be distracted or his duties as an employee may require his unavoidable exposure to it." (508)

The Circuit Court held that the rule pertaining to shipowners generally, where a condition is obvious, the question is whether (1) a longshoreman fully appreciated the condition at the time of the occurrence, for example, his attention was distracted, or (2) *he could not have avoided it since his job required him to work there.* In this connection the Circuit Court said that a man need not leave his job or face trouble for delaying the work if he sees a dangerous condition.

The Court stated:

> "The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen. Thus, it might be argued that *if this was the only place for Napoli to work and carry out his job, the vessel might reason-*

> *ably anticipate that he would use it despite its obvious danger,* since the only altrenatives would be to leave his job or face trouble for delaying the work." (p. 509) (Emphasis added)

The Circuit Court further stated that since shipowner is best able to anticipate and prevent harm from obvious dangers on a ship, he should be under a duty to take corrective action.

Here Irrizarry could not avoid exposure to the dangerously slippery condition of the top of the container where he had to walk to perform his work. The Shipowner knew of the condition and the jury so found. Under such circumstances, the Shipowner had a duty to take corrective action to make the place of work safe. To hold otherwise would be contrary to the House and Senate Committee Reports pertaining to the 1972 Amendments of the Act wherein they expressed their intent to hold Shipowner liable where, for example, there's a slippery condition on the deck.

The dangerous condition was not created by plaintiff or stevedore.

Furthermore, as the Circuit Court stated, there was testimony that it was the Shipowner's duty to clean off the ice. The longshoremen did not do that work and they have a right to rely on the ship's crew performing their work in a non-negligent manner,—not the reverse as Shipowner erroneously claims.

The Circuit Court held shipowner not to be insulated from the application of OSHA Regulations. See also *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (9th Cir. 1979), wherein the Court stated at 446:

> "In general, the regulations, which were promulgated under 33 U.S.C. § 941, were intended to eliminate the

> risk of injury to all longshoremen and not just to those who exercise prudence. *Denny* v. *Jugoslavenska Oceanska Plov,* 455 F.2d 1277, 1278 (CA5 1972). *The regulations* might prove helpful in suggesting types of measures deemed necessary for maintenance of a safe ship. *Darwin* v. *United States,* 435 F.Supp. 501, 507 (N.D.Cal.1977), and *are binding on the shipowner where he knew or should have known of a violation of the safety regulations. Anuszewski* v. *Dynamic Mariners Corp. Panama,* 391 F.Supp. 1143, 1145 (D. Md. 1975), *aff'd* 540 F.2d 757 (CA4 1976)".

See also, *Johnson* v. *A/S Iverans Rederi,* 613 F. 2d 334, 340 (1 Cir. 1980) wherein the Court stated that OSHA Regulations would continue to apply to *all* parties and may, in certain circumstances, define the appropriate standard of care.

As for reliance by Shipowner that stevedore would act to correct the condition, Judge Oakes in *Giglio,* 613 F.2d at 437, stated:

> An important factor in assessing the likelihood that the stevedore will act is the customary division of responsibilities with respect to a given risk.

Speaking of the ship's duty to correct the dangerous condition and make safe the area where the longshoremen had to work, the opinion states at 438:

> "That it is the *ship's* duty is substantiated by Part C §§ 1, 37 and 38 of the Joint Maritime Safety Code prepared by the New York Shipping Association, Inc., the International Longshoremen's Association, and Port of New York Joint Safety Committee, which surely qualify under the Safety and Health Regulations as a 'regulation or custom' and which read as follows:

> 1. The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear equipment, tools and work spaces which are to be used in stevedoring operations."

It should also be noted that Petitioner's attempted application of Sec. 1918.91(c) of the Safety Regulations is error. That Section states that "slippery conditions shall be eliminated *as they occur.*" The regulation is directed to the time when it occurs. Slippery conditions on board ship prior to turning same over to stevedores impose a duty on shipowner to correct the condition for it is their duty to furnish a reasonably safe place to work.

Thus, having a duty to alleviate the dangerous condition, they acted in a negligent manner breaching their duty and causing plaintiff to be injured. To have them escape liability for their breach of duty would be unconscionable under the facts in our case. Were this Court to agree with Petitioner's view, no cases could ever be brought against shipowner for their negligence, contrary to Congressional intent. It would likewise reverse this Court's opinions and in particular, *Kermarec* v. *Compagnie General Transatlantique,* 358 U.S. 625 (1959) and *Edmonds* v. *Campagnie Generale Transatlantique,* 443 U.S. 256 (1979).

In the latter case this Court held that the Amendment to the Statute did not override or modify the rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is even a minor contributing cause of his injury, and if the stevedore is partly to blame. In arriving at its conclusion, the Court stated that Congress did not intend to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the

ship. It points out that the Congressional Committee Reports repeatedly refer to the refusal to limit the shipowner's liability for negligence, which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee. Because an employee generally may recover in full from a third party concurrent tort feasor, these statements are hardly indicative of an intent to modify the law then in existence.

Although there may be inequities that may arise there should not be any shifting of the burdens onto the longshoremen. The Court makes clear that such burden of inequity should not be placed on the longshoreman because the Act seeks to protect him.

The Supreme Court further stated that the employer's fault is not imputed to the employee and *there may be no diminution of recovery due to the employer's fault but only due to his own fault.*

Since the Supreme Court felt that whatever rights the parties had at the time just prior to the 1972 Amendment still appertain, it should be noted that the Supreme Court, in *Kermarec* v. *Campagnie Generale Transatlantique,* 1959, 358 U.S. 625, set forth its own negligence standard as "the owner of a ship—owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case". (632)

Petitioner confuses the issues in a vain attempt to change the law. In line with that approach they completely ignore *Edmonds.* Many of the cases cited by Petitioner are based on reasoning rejected in *Edmonds* and their conclusions are in conflict with this opinion. It would have been important material and of benefit to this Court had Petitioner distinguished that opinion.

The duty of shipowner to correct the dangerous condition under the facts in our case arises from a number of sources including:

1. *Napoli* and Sec. 343A of the *Restatement of Torts, Second.* (Modern rule)

2. The practice in the Port of New York where only the ship's crew does the cleaning and removal of the ice. The longshoremen do not do that work.

3. Custom in the Port of New York for shipowners to remove slippery conditions and ice.

4. OSHA Regulations.

It is presumed that "the standard of care" applied to shipowner would also determine its duty. Under the facts in our case, regardless of definition of 'standard of care,' shipowner breached its duty at least arising out of the custom and practice in New York. Under the circumstances shipowner is liable for injuries and damages that result from their failure to exercise reasonable care.

To all intents and purposes, shipowner has an independent obligation to furnish longshoremen with a reasonably safe place to work and to see that a longshoreman is not exposed to harm.

Furthermore, the Congressional Committees' Reports and thus the intent of Congress was not to lessen shipowner's duties owed to longshoremen and Congress felt it would increase the safety on board vessels by holding shipowner liable for its negligence.

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the

> same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action which it knows or should have known about a dangerous condition." (Sen. Report, p. 10)

And the care required is reasonable care commensurate with the dangers to be encountered. It should be noted that the Committee stated that "longshoring remains one of the most hazardous types of occupations" so that the standard of care is necessarily a high degree of care.

Under the facts in our case, in view of the custom and practice in the Port of New York, the primary or perhaps the sole obligation to remove the ice and make the place of work safe was on the shipowner.

To hold that plaintiff could not recover against shipowner on these facts in any Circuit under any standard of care that is applied, would make a mockery of Congressional intent and in particular the example set forth in the Congressional Committee reports.

2. *The Non-Existent Conflict Between Circuits Under the Facts Presented*

Petitioner sets up a false issue of standard of care. They failed to relate the various case holdings to the facts in our case. By misstating facts and misinterpreting the law, they confuse the real issue here.

Basically, they seek to show a conflict between the various Circuits alleging that Sec. 343A of the Restatement was applied by the Second Circuit in our case whereas others have rejected the application of said section or "refined the application of the Restatement to longshoremen suits and developed the present conflict" (p. 14, Petition) with the Second Circuit.

Typical of Petitioner's erroneous reasoning is found at the very beginning of Point I. In discussing the First Circuit (p. 6, 7 Petition) *Anderson* v. *Iceland Steamship Company,* 585 F. 2d 1142 (1 Cir 1978), is cited for the proposition that Sec. 343A is inapplicable to a case where injury does not occur on the vessel. They urge a fictitious rule of law based on "situs."

Anderson is not analogous to our case and the above proposition is not applicable. That case involves a dangerous condition created by longshoremen on a pier upon moving cartons of frozen fish by hilo on the pier *after* they had been discharged from the vessel. The cartons had been placed on pallets on the ship by longshoremen and were so discharged onto the pier. Thereafter, forklifts carried the pallets with the cartons to Anderson's desk for checking. While being so moved by the forklift, some cartons fell to the pier floor. Wheels of the tractor rode over the cartons resulting in fish juices and slime being spread on the pier making it slippery under foot. The condition existed on the pier for two days. Anderson slipped and twisted his back.

The testimony showed that the longshoremen stacked the cartons on the pallet; it was they who had the duty and were required to place open and torn cartons into larger or master cartons for unloading but failed to do so. If the cartons were wet and soft, it was their duty to place same into drums for discharging. Furthermore, it was they who had the duty to maintain the pier; and it was their forklift and operator who spread the slime on the pier. The shipowner had no duties with respect to maintenance on the pier.

Thus, a slippery condition was created on the pier. There was no unsafe condition aboard ship as a result of slime and no difficulty in discharging the pallets onto the pier.

The ship's officers and crew did not know of the condition created on the pier.

The First Circuit held that in view of the absence of notice to shipowner and because the dangerous condition on the pier was created by the longshoremen after the cargo had been discharged from the vessel and after it was moved by the forklift, shipowner had no duty or liability for the breach of a duty to anyone injured on the pier. The Court therefore held that Sec. 343A was not applicable. The Court however said that when a dangerous condition is created off the shipowner's premises which is not "integrally related with conduct" on board the ship, supervisory control by shipowner is lacking.

It is this type of occurrence created on a pier unbeknownst to shipowner that gave rise to the First Circuit's stating that a shipowner could not be held liable under 343A for injuries on the pier.

It should be noted that our case does not involve a condition on the pier. It does involve a condition of cargo at a time integrally connected with the conditions on board ship; and a condition known to shipowner. It should also be noted that in *Delos Santos* v. *Scindia Steam Navigation Co., Ltd.,* 598 F.2d 480 (9th Cir.), the rule stated therein sets forth the standard of care as follows: "A vessel is subject to liability for injuries to a longshoreman working *on or near* the vessel caused by conditions on the vessel . . ." (485).

Thus, the accident need not occur on the vessel to find liability on the part of the shipowner.

Despite the foregoing, Petitioner proceeds to cite *Johnson* v. *A/S Ivarans Rederi,* 613 F. 2d 334 (1 Cir. 1980) claiming that that case enunciates the law to be applied in cases where the injury has occurred on the vessel. They

ignore the fact that *Johnson* follows *Santos*. They also fail to inform the Court that in *Johnson*, the First Circuit rejected the application of Sec. 343A (the Traditional view) because it was intermixed with assumption of risk and contributory negligence as a bar to the action. Since this contravened the intent of Congress, the Circuit Court felt that the *Kermarec* standard of care, namely, "reasonable care under the circumstances" should apply. The Court noted that congress intended that the standard of care must be designed to have the maximum, positive impact on safety and it must reflect the fact that the LHWCA is a remedial statute enacted to protect the longshoremen and not the vessel. They cite *Edmonds* v. *Compagnie Generale Transatlantique, supra* in support of their position. It is because of such important considerations the First Circuit adopted the standard of care owed longshoremen by the vessel which called for "reasonable care under the circumstances" which permits a finding of negligence upon showing: 1. That the vessel knew or should have known of the condition aboard ship which led to the injury; 2. That such condition would pose an unreasonable risk of harm to longshoremen; 3. That the vessel failed to exercise reasonable care "to protect the longshoremen against that danger."

The foregoing is consistent with the charge to the jury in our case.

It is of interest to note that the Court viewed Secs. 343 and 343A of the Restatement to be more favorable to the vessel than the standard of care that they favored. Since the charge to the jury there was based on Sec. 343A and the jury verdict was nevertheless in plaintiff's favor, the Court felt that it would also have found the vessel solely negligent under the standard of care adopted by the First Circuit and hence, the verdict should not be disturbed.

Obviously, Petitioner has missed the point and were plaintiff's case tried in the First Circuit, under the standard set forth in *Johnson,* plaintiff would have recovered in any event. Hence, there is no conflict of interest between the First and Second Circuits as it pertains to the facts in our case and in the result that would follow.

Petitioner is clearly in error as to the meaning and import of the cases in the Third Circuit. They have overlooked *Griffith* v. *Wheeling-Pittsburgh Steel Corp.* 610 F.2d 116 (3 Cir. 1979). There the Court analyzed the "pattern of our earlier decisions" (124) which included *Rich* v. *United States Lines,* 596 F.2d 541 (3 Cir. 1979) *and Hurst* v. *Triad Shipping Co.,* 554 F.2d 1237 (3 Cir.) cert. den. 434 U.S. 861 (1977). The Court commented that these decisions "do not, however, speak directly to the scope of the vessel's independent duty under §905(b) to 'exercise the same care as a land based person in providing a safe place to work.'" (124) *Griffith* adopted the standard of care which imposes on the shipowner the duty to exercise reasonable care under all the circumstances in the case.

The defendant barge owner argued in *Griffith* against this standard of care, claiming that:

> ". . . a vessel should not be held liable in negligence under §905(b) if it has delivered the ship 'in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter' will be able to load or unload the vessel safely by excercising 'ordinary care under the circumstances.'" (124)

This is the same approach that Petitioner takes by urging the application of *Hugev* v. *Dampskisaktieselskabet International,* 170 F.Supp. 601 aff'd 274 F.2d 875, (9 Cir.) cert. den. 363 U.S. 803 (1960).

The Third Circuit rejected this approach contrary to Petitioner's view, stating:

> "Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an "expert and experienced" fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds* v. *Campagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule barring all recovery against a negligent shipowner on the basis of imputed employer negligence." (124)

Barge owner, in *Griffith,* alternatively urged that the Court adopt the standard of care established in the Restatement of Torts, Second, Secs. 343-343A. The obvious intent there was to have the Third Circuit adopt the Traditional point of view of the Sections rather than the Modern view as set forth in *Napoli,* supra. The Court understood it to be so and referred to Comment (e), §343A (but see Comment (f)) and rejected the application of said Section because that would mean that a negligent invitee assumes the risk of injury. This would be contrary to the stated intention of Congress to abolish the doctrine of assumption of risk in these cases and have comparative negligence apply.

Perhaps more important as it affects the Petition here, the Circuit Court noted that:

> ". . . the same result would be reached whether one applied the Restatement §343 formulation or the more universal duty to exercise reasonable care under all the circumstances." (123)

This, of course, would be so if the Modern view as expressed in Napoli and Comment (f) of §343A were applied.

The Fourth Circuit has applied at times the Traditional concept of negligence which imputes stevedore's negligence to the longshoremen; charges plaintiff with assumption of risk and charges the stevedore with primary obligation to correct the dangerous condition relieving shipowner of its liability. This, however, is contrary to Congressional intent and contrary to the Supreme Court's decision in *Edmonds.* Perhaps more to the point is *Bess* v. *Agromar Line,* 518 F.2d 738 (4 Cir. 1975). There plaintiff claimed that shipowner breached its duty to provide suitable dunnage to be used in covering bales of cargo. The Circuit Court in effect held that if shipowner had the duty to furnish dunnage or to have someone there to make it available or there was the practice or custom in the trade for shipowner to provide the dunnage, the shipowner is liable for the results of failing to so provide same.

Even petitioner recognizes that if there is a duty to correct open and obvious conditions, there is liability for failure to correct same. (P. 12 of Petition.) In our case as hereinbefore set forth, shipowner did have a duty to correct the dangerous condition and failed to do so.

The Fifth Circuit still considers *Gay* v. *Ocean Transport & Trading Ltd.,* 546 F.2d 1233 (5 Cir. 1977) as the law to be followed. In that case the Court adopted the Modern rule as set forth in *Napoli.* It noted that the Traditional

rule is premised on the concepts of contributory negligence and assumption of risk which are inappropriate in 905(b) cases.

The Petition here finds the 'standard of reasonable care under the circumstances' as set forth in *Santos* v. *Scindia Steam Navigation Co., supra,* is not supported by legislative history or the various courts' opinions. Presumably the same objection would apply to the *Johnson* Opinion of the First Circuit and the *Griffith* Opinion of the Third Circuit. It is submitted that the three foregoing opinions make considerably more sense in the light of Congressional intent and in keeping with social progress. The archaic views expressed by all too many courts with involved explanations attempting to rationalize decisions that do not avoid harsh results should not be encouraged. Petitioner would have the clock turned back to the previous century.

Sufficient unto itself is the observation of the Court in *Santos,* 598 F.2d at 491, fn. 8, that the "standard of reasonable care under the circumstances is very similar to the standard set forth in the Restatement of Torts, Sec. 343 and 343A minus the limitations placed on recovery by Sec. 343(b) and 343A(1)." Had the District Court there not relied on the limiting provisions of said sections, the Circuit Court would have treated the law applied as harmless error.

The standard of care applied in our case is, therefore, not in conflict in result obtained if it were tried in the First, Third and Ninth Circuits. Nor would the facts in our case have resulted in a different verdict if tried in the Fourth and Fifth Circuits. The duty of shipowner to take corrective measures here not only arises from the standard of care applicable, but such duty stems from custom and practice in the Port of New York. There is testimony in our case showing such practice. Not only does

shipowner have such duties from the OSHA Regulations, but from the Safety Code promulgated by the shipping industry referred to in the Opinion of the Circuit Court in our case. What better way of establishing custom and usage in a trade than such industry-wide code.

Having violated its duty, shipowner could not shift its responsibility for the injuries that resulted by claiming the employer should have taken care of it. The Court in *Lopez* stated that there was no reason, as a matter of fundamental tort law, why it should not be held liable in damages for its own negligence.

> "It is well established tort law that "an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this." *Petition of Kinsman Transit Co.,* 338 F.2d 708, 719 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965)." (581 F.2d at 324)

III.

CONCLUSION

The issues raised by Petitioner claiming conflicting standards of care as a basis for the relief requested herein is a fictitious one. It has no bearing on the determination of our case on the facts in our case. The last sentence of the Petition (p. 23) reveals shipowner's purpose herein—namely, consolidation with other cases in which petitions have been granted, where the same "standard of care issue" is raised.

To support its position, shipowner changes the facts in our case and distorts the law. We are unaware that such approach has ever justified the granting of a Writ of Certiorari.

Petitioner's obvious desire to participate in a matter in which an appeal is pending could be achieved in some other way and should not involve our case in the manner pursued.

Every court, no matter what its view of the standard of care, would, on the facts here in evidence, sustain the verdict of the lower court. The decision of the Circuit Court, sought to be reversed, should be affirmed. Denial of the shipowner's Petition would effectively do just that.

It is, therefore, submitted that the Petition should be denied.

Respectfully submitted,

MORRIS CIZNER
Counsel for Respondent
160 Broadway
New York, New York 10038

APPENDIX

APPENDIX 1

Pertinent Portion of the Charge to Jury

[197] * * *

Turning to the facts of this case, on February 1, 1977, the plaintiff, Sam Irizarry, was a dock man, employed by Sealand Terminals, Inc., a stevedoring company. As such, he was a harbor worker. I shall sometimes refer to him as a longshoreman.

In this suit he asserts a claim for damages which he alleges were caused by the negligence of the defendant Companhia Maritima Navegacion Netumar, S.A. The defendant which I will sometimes call the shipowner, denies that it was negligent or that it violated any duty it owed to plaintiff.

In addition, it claims that plaintiff caused or contributed to his own injury. Let us consider the plaintiff's claim.

In order to recover, the plaintiff must prove by a preponderance of the credible evidence that the accident occurred in the manner claimed by him, that the defendant was negligent and that its negligence was a proximate cause of plaintiff's accident. What is the negligence?

[198] Negligence is the doing of some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the same or similar circumstances.

In other words, it is the failure to use ordinary care under the circumstances.

The prior fact that an accident happened to the plaintiff does not by itself make the shipowner liable to him. The plaintiff must prove by a preponderance of the credible evidence that an accident happened to him that was caused by the shipowner's negligence.

Appendix 1

The plaintiff claims that he was injured because the shipowner negligently failed to provide him with a safe place to work.

To sustain his claim he urges that the failure by the ship's crew to remove ice and melting slush from the top of a container on which the plaintiff was required to work caused him to slip and fall, thereby sustaining injuries. He claims that the shipowner had a duty to provide him with a safe place to work, that the shipowner breached its duty and that as a result he was injured.

He claims that the ship's first mate knew that there was ice and melting slush on the tops of containers which were being unloaded from the ship, and that [199] the shipowner should have had the ice and melting slush removed and that its failure to do so was negligence. In this case a violation of the shipowner's duty to supply Mr. Irizarry with a reasonably safe place in which to work.

The shipowner would be liable for unsafe working conditions of which it was or should have been aware and for any negligence by the ship's crew. To recover, the plaintiff must establish that the mate knew that ice and melting slush was on the top of the container on which the plaintiff alleges that he slipped and fell; and that the defendant negligently failed to have it removed, that the ice or melting slush had been on the top of the container for such a period of time that it should have been discovered and removed by the ship's crew in the exercise of reasonable care by the shipowner under the circumstances.

Plaintiff contends that prior to the accident, Mr. Esposito, a member of plaintiff's gang, advised the mate of the presence of ice on the containers, and that the mate shrugged and walked away.

Appendix 1

If you believe the testimony of Mr. Esposito in this regard, you may find that the shipowner knew that there was ice on the containers and its failure to remove the ice may be considered negligence for which the shipowner would be liable.

[200] You have heard me use the words "proximate cause." In order to show proximate cause, it is necessary for the plantiff to demonstrate that a chain of events flowed from defendant's claim of negligence and led to the damages which plaintiff seeks to recover, a chain of events unbroken by any other event for which the defendant is not liable.

If you find the shipowner negligent and that the shipowner's negligence was a proximate cause of plaintiff's accident, the shipowner would be liable whether or not you find that the plaintiff is also negligent. It is not a valid defense to a suit like this one to contend that the injured longshoreman assumed the risk of his employment if the injury resulted in whole or in part from the negligence of the shipowner.

Although a longshoreman never assumes the risk of injury from the negligence of another, it is a fact of common knowledge that in almost every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of negligence.

A longshoreman when he enters upon his calling must assume all inherent and unavoidable risks of his occupation as all persons must and no person may recover for injuries resulting solely from such inherent and [201] unavoidable risks. Also, the shipowner is not liable merely because there has been an accident and a longshoreman has been injured. The shipowner is liable only if it has been negligent. If a longshoreman is injured as a result of the

normal hazards or risks of the business in which he is engaged without participation on the part of anyone else, he is not entitled to recover damages from the shipowner.

You heard counsel for the defendant contend that the plaintiff was himself negligent, and that the plaintiff's negligence caused his injury. This is a defense, and the burden of proving the plaintiff was himself negligent or as it is sometimes said, contributorily negligent is on the defendant. But the fact that the plaintiff's acts may have contributed to causing his accident in an injury, does not by itself prevent his recovery of damages. In suits like this one, you are required to find whether the plaintiff was guilty of what we call contributory negligence, and if so, what percentage his contributory negligence contributed to the accident, but this does not prevent his recovery. It only reduces the amount.

* * * * *

[208] Mr. Lassoff: But they won't know necessarily it's a stipulated fact.

Mr. Delaney: He said it was stipulated.

The Court: I think I just said that the parties stipulated as to medical expenses. I don't believe I did give the amount. I will do that, because you did so stipulate.

Are there any requests for supplementary instructions, Mr. Lassoff?

Mr. Lassoff: No, sir.

The Court: Very well. Mr. Delaney, are there any questions?

Mr. Delaney: The defendant has no exceptions, your Honor. The only further request to charge is that with regard to the shipowner's duty to provide plaintiff with a safe place to work that this—the shipowner does not owe

the plaintiff an absolute duty to provide a safe place to work and that consequently by employing the stevedore to discharge the vessel that the stevedore has certain responsibilities under the law which the shipowner has a right to assume that the stevedore will perform.

Mr. Lassoff: Your Honor, the plaintiff is not the stevedore. Whatever rights the ship has had against the stevedore, Congress has stated in the Edmonds v. Compagnie case it's too bad if the ship has to bear that [209] burden but it says the system devised by Congress did not intend to pass the economic loss of the stevedores negligence onto the longshoremen and that is what Mr. Delaney is trying to do.

The Court: I have had the opportunity to review the syllabus in Edmonds v. Compagnie General Transatlantic, decided by the Supreme Court on June 27, 1979.

As I read the Edmonds case, the liability and the question of the negligence of the shipowner stands on its own two feet. I think if I were to supplement my charge to the extent requested, it would not be correct as a matter of law and would be confusing upon the jury. I think I have set forth the law as it presently exists, and therefore I decline to supplement my charge.

Is there anything further?

Mr. Delaney: Nothing further. Just I would like to note my exception.

The Court: You have your exception.

The one thing I will do is to indicate to the jury that the parties have stipulated that the medical expenses were $1,545.

Is there anything further?

Mr. Delaney: No, your Honor.

Mr. Lassoff: No your Honor.